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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,
Petitioner,

against

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., EDUCATIONAL MEDIA PRODUCERS COUNCIL

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This brief is submitted in behalf of Association of American Publishers, Inc. (AAP), The Association of American University Presses, Inc. (AAUP), and Educational Media Producers Council (EMPC) as amici curiae.

AAP is a trade association of book publishers in the United States. Its 260 member companies and subsidiaries are believed to produce 80% or more of the dollar volume of books published in the United States. Some of its members also publish scientific and technical journals. The Williams & Wilkins Company is not an AAP member.

AAUP is a not-for-profit educational membership corporation. Its 66 regular and 7 international members are scholarly publishing divisions of colleges and universities and other educational institutions located primarily in North and South America.

EMPC is an organization within the National Audio-Visual Association. Its 70 members produce approximately 90% of the audio-visual materials used in schools and libraries.

The Interest of the Amici

The interest of the amici is to correct the Court of Claims' conclusions with respect to the photocopying practices of the National Institutes of Health and the National Library of Medicine (NIH and NLM respectively), which by implication affect all publishers. But even more important the court's erroneous construction of basic principles of copyright law would, if carried to its logical extreme, undercut the continued production of intellectual material of every kind—books, journals and audio-visual material, whether produced for profit or on a not-for-profit basis.

Preliminary Statement

What is involved here is large-scale, planned. systematic microfilming and electrostatic reproduction of copyrighted material with sophisticated commercial-type equipment by

- a central library, which by prearrangement meets the needs on demand of satellite libraries in its network (and those of commercial companies as well), and
- a medical institute which, through its central library, supplies its large staff with copies in lieu of the original.

Central libraries and library networks, or systems, whether organized along geographic or specialty lines, exist because of the value of sharing library resources. "Sharing" is a euphemism which in library terms means that by the systematic use of photocopies one published copy of a work can take the place of many.[1]

Library sharing may serve a social purpose. But unless the publisher is otherwise compensated, the "sharing" principle will discourage the publication of the very works which a library may want to acquire and share with others. Publishing requires capital investment, and publishers, whether in the profit or non-profit sector, in order to continue publishing must in the long run produce enough income from sales and licensing to cover the cost of production and distribution and the cost of the required capital.

True library lending in its original form, the actual delivery on loan of the published work itself, does not appreciably limit the anticipated publishing income.[2] Copy-

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[1] "Librarians have long shared resources through such means as union catalogs and interlibrary loans. During recent years, encouraged by Federal and state leadership and funding, they have begun to evolve more formal, contractual 'systems,' 'consortia', 'networks', a few of which, such as MEDLARS, already benefit from computer and telecommunications technology in the provision of regional and local services from national resources. Typical of evolving networks are the intrastate programs in Washington, Ohio, Illinois, New York and California, and the interstate programs in New England, the Southeast and the Southwest. Increasingly, the search for fruitful ways to share the public/private knowledge resource crosses geographical, jurisdictional and type-of-library boundaries." National Commission on Libraries and Information Science, A NATIONAL PROGRAM FOR LIBRARY AND INFORMATION SERVICES: A SYNOPSIS OF THE SECOND DRAFT PROPOSAL, at 4 (June 1974) [hereinafter cited as "SECOND DRAFT PROPOSAL"].

[2] The number of loans is necessarily limited because of the time interval between the borrowing and the return of the loaned books, and loaned copies deteriorate and require replacement.

ing as practiced by NIH and NLM creates an open-end drain on the prospective market, making economically marginal journals unpublishable and many of those otherwise economically sound, marginal.

Summary of Argument

The majority below held that photocopying in the manner done by NIH and NLM was "fair", not "unfair" use and hence was non-infringing.

In so deciding it erred. The fair use doctrine is simply not relevant to the massive copying operations conducted by NIH and NLM which involve not only copying, but printing and reprinting by sophisticated equipment, and publication by wide distribution.

Fair use, by definition, applies only to copying which does not reduce the potential market for the original. NIH and NLM copying makes it unnecessary for others to enter subscriptions for the medical journals to which NIH and NLM subscribe, thus reducing the number of subscribers. NIH would obviously need more than two copies of the plaintiff's journals to serve the employees of its ten institutes were it not for its comprehensive photocopy service. And NLM, a self-styled "librarian's library", advertises to others in effect that they need not purchase the published article from plaintiff because NLM will supply copies free.

NIH and NLM photocopying may be in the public interest (as is the publishing activity of Williams & Wilkins), but the issue here is not whether it should continue or be stopped, but whether the plaintiff should receive reasonable compensation for the copying.

The fear of the majority, underlying its entire opinion, is that if NIH and NLM should be required to pay copying

fees to the plaintiff, copyright owners would be free to enjoin non-government library copying of medical journal articles and thus impede medical research. This is a *non-sequitur*. Injunction is an equitable remedy and in an appropriate case may be refused with the award restricted to damages.

The majority exceeded the limits of judicial authority and assumed a Congressional policy-making role. It chose by a process of "thumb's up or thumb's down" reasoning to exempt defendant's copying practices from payment. It justified its conclusion by saying that it lacked Congressional guidance, but in fact it ignored it.

The decision was wrong for other reasons as well. In drawing a non-existent distinction between the unauthorized printing of a periodical or book and its unauthorized photocopying, the majority misread § 1 of the Copyright Law. By confusing the issue of damage and of liability, it misread § 101 of that Law. It also erroneously assumed that systematic copying such as that done by NIH and NLM is accepted in most other countries as fair use.

The decision should be reversed and the opinion of the trail judge reinstated, but, we suggest, with prospective effect only, so that libraries will not be penalized for past error.

POINT I

Defendant's copying was prima facie infringement.

The majority expressed uncertainty whether the copyright law forbids the "copying" of books and periodicals. It did so because of the distinction it found in the earlier Acts between the proscription against the *copying* of photographs, paintings and drawings and the *printing and publication* of books.

The current Act (17 U.S.C. § 1) draws no such distinction, if any formerly existed, giving the copyright owner the exclusive right:

> "to print, reprint, publish, copy and vend the copyrighted work."

These are repetitive terms[3] conferring the right to *make* copies and to *publish* copies; printing and reprinting being "modes of copying," and vending "a mode of publishing".[4] There is no basis for and the majority was clearly wrong in drawing a distinction between unauthorized printing and the unauthorized photocopying of a book or periodical.

The majority was likewise wrong in concluding that defendant's extensive copying operation did not constitute printing or publishing. To print is "to make an image of;" to publish is "to issue . . . for distribution to the public."[5] NIH and NLM reproduce and make images of copyrighted material for distribution to the public. They copy, they print and they publish.

The majority held the plaintiff had failed to show damage, and therefore had failed to prove infringement. In so holding, it confused the issues of damage and liability.

§ 1, as noted above, gives the copyright owner the exclusive right to make copies of the copyrighted material. One who makes unauthorized copies therefore infringes, subject to the application of the fair use doctrine. Be-

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[3] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Comm. on the Judiciary, 87th Cong., 1st Sess. 21 (Comm. Print July 1961).

[4] Id.

[5] Random House Dictionary of the English Language (unabridged ed. 1966).

cause it is recognized that damage is often difficult to prove, § 101 provides that an infringer shall pay to the copyright proprietor in lieu of actual damage such damage as the court shall deem just. And 28 U.S.C. § 1498(b), under which this suit is brought, provides that whenever copyright is infringed by the United States, the copyright owner shall be entitled to reasonable compensation.

The issue for initial determination is infringement, not damage. Infringement is not dependent on a showing of damage; if infringement is found, damage or compensation follows as a matter of course.[6] Infringement was shown, and as we discuss below, fair use was not.

POINT II

Defendant's copying was not fair use.

Fair use is the dominating theme of the majority's opinion. Its conclusion was that plaintiff had failed to show that defendant's use of plaintiff's material was "unfair;" conversely, it found that it was "fair," and hence not infringing.

In so deciding, the majority appears to have assumed that plaintiff had the burden of showing that defendant's use was unfair. If such was its assumption, it was in error. The burden was on defendant to show that its copying was not infringement because it was protected fair use.[7]

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[6] M. Nimmer, Nimmer on Copyright § 145, at 655 (1974) [hereinafter cited as "Nimmer"]; Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins v. United States*, 21 Bull. of the Copyright Soc'y. of the U.S.A. 204, 205 (1974).

[7] B. Ringer & P. Gitlin, Copyrights 68-69 (revised ed. 1965).

But the majority's core error lay in its total misunderstanding of the fair use doctrine and the limits within which it may be applied. Fair use is a doctrine of law; it is not an *ad hoc* remedy to be committed to the conscience of judges.[8] It applies only when prescribed standards are met; not as here, because of a conclusion that "on balance . . . thumb's up seems less dangerous to the varying interests at stake during the period which remains before Congress definitely takes hold of the subject."

Fair use developed as an author's right to borrow from or build upon or to criticize earlier works. It was in this context that Mr. Justice Story[9] enumerated the classic tests which have been restated in S.1361, the proposed copyright revision bill;[10] namely, the purpose and character of the work; its nature; the amount used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or the value of the copyrighted work. All are inter-related but the effect of the copying upon the copyright owner's potential market for the copyrighted work is recognized as of prime importance.

The majority below discusses the scholar's practice to make handwritten notes for his own use. But as Nimmer notes: "the drudgery of making handwritten copies probably means that such copies in most instances are *not* of the complete work [italics supplied], and the quantitative *insignificance* of the selected passages are such as generally not to amount to a *substantial* similarity"[11] (italics in original).

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[8] cf. *Gertz* v. *Robert Welch, Inc.*, 42 U.S.L.W. 5123, 5130 (U.S. June 25, 1974).

[9] *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4901 (D. Mass. 1841).

[10] *S. 1361, 93d Cong., 2d Sess. § 107* (1974).

[11] NIMMER, *supra* note 6, at 656.2.

The library is a new party to the dichotomy. It copies neither for its own authorship nor scholarship. It copies to fulfill the requests of others.[12]

We do not argue that library copying can never be fair use. Some library copying undoubtedly is, but "like everything else, [it] must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case."[13]

There are many different kinds of libraries and of library copying. Copying is sometimes done by local libraries; the kind of copying of a page from a book that was the subject of comment by Senator Burdick during the 1973 hearings before the Senate Subcommittee,[14] or copying to replace a damaged page of a work in the library's collection, or to aid the court in litigation, all of which in our view would be fair use.

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[12] Seemingly aware of the basic difference between copying by a scholar and by a library, the majority, albeit with embarrassment, suggested "that the library is nothing more than the individual requester's ministerial agent." This is a totally meritricious argument as Chief Judge Cowen noted in his dissent: "This argument is so far-fetched that the majority balks at embracing it completely. It collides with reality. The libraries installed and operate the reproduction and distribution operation on their own initiative and without any kind of an agreement with the ultimate users of the copies. There is no showing that these alleged—and in the case of NLM generally unknown—principals have any say in the formulation of the policies and practices of the photocopying operation. The libraries decide, without consulting or obtaining the consent of the alleged principals, whether to loan the original of the journals or to provide photocopies. The libraries are no more the agent of the users of the material than are the venders of plaintiff's magazines and the commercial concerns which are licensed by plaintiff to make and sell copies to doctors and scientists. The essential elements of agency are wholly lacking."

[13] *H.R. Rep. No. 83*, 90th Cong., 1st Sess. 36 (1967) [hereinafter cited as "HOUSE REPORT"].

[14] HEARINGS ON S. 1361 BEFORE THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess. 91-96, 268-69 (1973) [hereinafter cited as "SENATE HEARINGS"].

Libraries in the Interlibrary Loan Program also copy. This is a different kind of copying which is done by one library for another. Nevertheless some of that copying too may be fair use if it is random and occasional and not systematic, and if it would have been fair use for the requesting library to itself make the copy, and if the request is limited to an unusual item which the requesting library would not normally own and could not readily obtain at moderate cost.

This indeed is the justification which the libraries advance for the Program. The Interlibrary Loan Program is bottomed on the principle that "interlibrary lending does not relieve any library of the responsibility of developing its *own* collection"[15] (italics supplied), that *each* library's collection will be sufficient to meet the normal research needs of its *own* users and that requests for material from other libraries will be limited to unusual and costly items.[16]

NLM's copying is not interlibrary loan copying as the libraries themselves define it. NLM does not do random or occasional copying nor does it limit its copying to the unusual or the costly. NLM is a "librarian's library"; its function is to systematically make copies for other libraries and commercial houses; the effect of such copying is to make it unnecessary for those other libraries (profit-

[15] S. THOMSON, INTERLIBRARY LOAN PROCEDURE MANUAL 10 (American Library Ass'n 1971).

[16] "It is assumed that *each* library will provide the resources to meet the study, instructional, informational, and *normal research needs of its users*, and that requests for materials from another library will be limited to *unusual items* which the library does not own and *cannot readily obtain at moderate cost*. Requests for individuals with academic affiliations should be limited to those materials needed for faculty and staff research, and the thesis and dissertation research of graduate students." (italics supplied), *id.* at 2.

connected as well as non-profit) to have balanced collections sufficient to meet the normal needs of their own users. (The journals in suit are among the leaders in their field, and their cost ranges between $12 and $44 per year.) This kind of copying, as "distinguished from isolated and unrelated reproduction", cannot be fair use because it "may substitute the copies reproduced by the source library for subscriptions which the receiving libraries or users would otherwise have purchased for themselves."[17]

The New York Public Library and the libraries of Columbia, Yale and Harvard have recently announced the organization of a "consortium" to engage in the same kind of copying, but they state their purpose more frankly than do the defendant and its amici. They are joining in what the New York Times characterizes as:

> "a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings."

The effect of this according to the New York Public Library is that it:

> "might eventually enable the library to spend 20 to 25 per cent less a year for acquisitions than it would otherwise."[18]

Systematic copying such as that engaged in by NLM and planned by the consortium can never be fair use because its purpose or effect is to substitute the copy for the original. The majority erroneously held that NLM's copying is fair use. With this as encouragement the consortium

[17] cf. S. Rep. No. 983, 93d Cong., 2d Sess. 122-23 (1974) [hereinafter cited as "SENATE REPORT"].

[18] PACE, *Four Major Libraries Combine Research Operations*, N. Y. Times, March 24, 1974, at 59, col. 1.

says that their copying too will be fair use and therefore they have "no plan" to pay for it.[19]

Library copying such as that employed by NLM and to be employed by the consortium may be desirable. We think it clear however that that kind of library copying must pay its way; that a library engaging in that kind of copying must be recognized for what it is, an "on-demand"[20] reprinter and publisher, and that it must recognize the rights and the interests of the copyright owners if only "to protect the economic viability and continued creativity of authorship and publishing."[21]

NIH copying, on the other hand, does not even fall under the rubric of interlibrary loan copying. NIH copies for the use of its *own* large staff. As the Chief Judge stated, "One copy of the original material could not possibly be

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[19] *Id.* at col. 4.

[20] "On-demand" publishing was recently described as follows: "An author (typically a scholar with a work of strictly limited interest) deposits in a central location a camera-ready typed manuscript, which is kept in that form, or else as microfilm or microfiche. Single copies of it can then be produced from the same central location, as orders are received. A computer can be used to keep track of titles for which multiple copies are needed, and those for which demand may merit a shift in conventional publication. The advantages of such a system, Smith said, were no composition costs; no production costs except those incurred, copy by copy (probably about two cents a page), on demand; no storage cost, or wasted paper costs; and no title ever out of print." Publishers Weekly, July 8, 1974, at 44.

[21] *cf.* N.C.L.I.S., Second Draft Proposal, *supra* note 1, at 3. "The resolution of the complex national problems of copyrights is crucial to cooperative programs. The judicially constructed doctrine of 'fair use' is only a partial answer, and the eventual solution must reconcile the rights and interests of authors, publishers and other providers of information with those of the user. New understandings about copying from network resources, especially in the context of new means of reproduction and distribution, are needed to protect the economic viability and continuing creativity of authorship and publishing."

loaned to as many requesters as the numerous photocopies. . . . While the library may look at the giving of a photocopy as a substitute for a loan, the user and would-be purchaser gets an exact copy of the original article which is a substitute for a purchased copy."

NIH copying, in this respect, is no different in kind or quality than that which a large drug company might engage in to save the cost of multiple subscriptions for its in-house staff. In each case, the copying is done in lieu of purchase of the original; in each case the publisher's market has been diminished; in neither case can fair use be a defense.

The finding of fair use is not helped by the "non-profit" element so much relied on by the majority because there is no "non-profit" exemption.[22] Defendant's wholesale copying clearly infringes and its non-profit nature is irrelevant.

Indeed, the emphasis on the non-profit character of the copying introduces a note of the absurd. If it were otherwise no author or publisher would find it possible to produce a work intended for school or hospital or government use, and no purpose would have been served by enactment of a statute permitting the United States to be sued for copyright infringement.

POINT III

There is no basis for the court's major premise: that photocopying will be halted and research hindered if defendant's copying practices are found to infringe.

The majority erred in concluding that photocopying of articles in journals will be *stopped*, with resulting injury to research and science, if judgment in favor of plaintiff is affirmed.

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[22] House Report, *supra* note 13, at 31.

As against the defendant, 28 U.S.C. § 1498(b) permits only a recovery of reasonable compensation, with injunction barred.

Although 17 U.S.C. § 101 authorizes injunctive relief against others, the majority's apprehension that injunction will automatically issue with consequent injury to science is unjustified. As Judge Nichols noted, courts in an appropriate case can refuse injunctive relief if equity so requires.

POINT IV

The majority decision ignores the congressional purpose that wholesale library copying be licensed and not exempted from copy fees.

The majority below appeared unaware that the House and the Senate Judiciary Committees have rejected the library proposal for a blanket exemption of library copying of journal articles; that both Committees have pressed the parties to develop workable clearance and licensing procedures for library copying,[23] and that the defendant and its amici have refused to cooperate and have instead chosen to pursue an adversary position before the court and Congress.[24]

In 1972 AAP and its fellow amicus, the Authors League, initiated a series of meetings with representatives of American Library Association (ALA), Association of Research Libraries (ARL) and others. In September 1972, acting upon a proposal of one of the library representatives, a statutory amendment was drafted which would have given journal article copying rights to libraries under

[23] SENATE REPORT, *supra* note 17, at 122-23; HOUSE REPORT, *supra* note 13, at 31, 33.

[24] SENATE HEARINGS, *supra* note 14, testimony of W. Bradford Wiley 143-46, testimony of Jerome Weidman 175-76.

stated circumstances. However, before any of the other groups could take formal action ALA and ARL flatly rejected the compromise without identifying in what respects it was unacceptable, without offering any changes for terms that were objectionable, and without offering any alternative solution.[25]

Again in March of 1973 representatives of publishers and authors met with representatives of ALA, ARL and other library spokesmen to discuss a possible licensing system for library copying of journal articles, but again the effort failed because of library insistence on a right to copy without payment to the copyright proprietor.[26]

Notwithstanding this adamancy, AAP as it stated to the Senate Subcommittee in 1973 has remained willing to cooperate with the library associations in developing a workable clearance procedure.[27]

The majority attached no weight to this background. To it libraries should receive "the benefit of the doubt" and to it the publisher seeking payment for systematic library copying is "the dog in the manger."

In so concluding the majority sought comfort in the doctrine of judicial restraint. But, as Goldstein notes, "judicial restraint does not mean that the parties and their dispute are to be untouched by judicial action."[28] The court took no account of the unwillingness of the libraries to cooperate in the establishment of workable clearance

[25] *Id.* at 146.

[26] *Id.* at 173.

[27] "We recognize the need for workable clearance procedures. By their very nature, however, they should be established by mutual agreement, not unilaterally or by statutory fiat. We have offered before and offer again to cooperate with the library associations in working out the necessary arrangements." *Id.* at 145.

[28] Goldstein, *supra* note 6, at 211.

arrangements as requested by the House and Senate committees. And it took no account of the public need and the constitutional imperative for encouragement and incentive to authors and publishers.

POINT V

Foreign law and practice do not justify the majority's decision.

The majority relied to some extent on foreign copyright law and practice. As Chief Judge Cowen said, there was no reason to delve into foreign legislation; what was needed was a reading and interpretation of the 1909 Copyright Act.

The Court should be aware however that the majority was mistaken in its view of foreign law. In France the court has recently decided that the National Science Center, a counterpart of NLM, was guilty of violation of French copyright law for pursuing practices virtually identical with those of NIH and NLM.[29]

In Holland, pursuant to Article 17 of The Netherlands Copyright Act, as amended by the Law of October 27, 1972,[30] a regulation has been issued, to become effective August 25, 1974, requiring libraries and other non-profit institutions to pay a copying charge to the copyright proprietor for copying of journal articles and small portions of books.[31]

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[29] *Masson & Cie, et al.* v. *Centre National de la Recherche Scientifique*, (Le Tribunal de Grande Instance de Paris Jan. 28, 1974) (France).

[30] The Netherlands Copyright Act of 1912, as amended, Oct. 27, 1972, in World Intellectual Property Organization, Copyright, No. 9, at 181 (Sept. 1973).

[31] Publishers Weekly, July 15, 1974, at 63.

The majority referred to a 1968 UNESCO and BIRPI Committee report which recommended that libraries should have the right to provide their patrons with copies of journal articles. It was unaware, however, that the Intergovernmental Copyright Committee meeting in December 1973 determined that the question "is not yet ripe for taking a definitive stand" and that the study should be continued.[32]

CONCLUSION

The Court's construction and application of basic copyright law were wrong and should be corrected. If carried to logical extreme they would largely undercut the entire law of copyright.

We respectfully suggest that the interests of the parties and those of the copyright-interested community may be served by a determination that library photocopying prior to the date of this court's decision should be exempt from liability but that photocopying such as that practiced by NIH and NLM after that date shall constitute infringement.

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[32] World Intellectual Property Organization, Copyright, No. 2, at 55-56 (Feb. 1974).

Accordingly we respectfully urge that the judgment of the Court of Claims be reversed.

Respectfully submitted,

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